

New Project: Due Diligence Requirements under the Securitisation Regulation

On the recommendation of the FMLC's Securities Markets Scoping Forum, the Committee has adopted a project considering issues of uncertainty arising from the regulatory due diligence obligation on "institutional investors" (set out in Article 5 of the EU Securitisation Regulation) to verify that they are receiving E.U.-style disclosure (as described in Article 7 of the EU Securitisation Regulation) from the originator, sponsor and SSPE (i.e. issuer) of a transaction. In particular, there is a question as to whether this particular diligence obligation extends to circumstances where the originator, sponsor and SSPE are established in a third country.

While there is a market consensus that non-E.U. entities have no direct obligation under Article 7 to comply with E.U. disclosure requirements, it may be that institutional investors within the meaning of the E.U. Securitisation Regulation would nonetheless be prevented from investing in circumstances where a non-E.U. entity fails to comply voluntarily. The question arises from the interpretation of Article 5(1)(e) of the E.U. Securitisation Regulation. Article 5(1)(e) requires an institutional investor to verify that "the originator, sponsor or SSPE has, where applicable, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article" (emphasis added). The meaning of the words "where applicable" have been interpreted in different ways by market participants.

If you'd like to get involved in this project, please contact Eleanor Hooper at legalanalysis@fmlc.org.

Coming Soon: Paper on Initial Coin Offerings

The FMLC's Working Group on Initial Coin Offerings ("ICOs") has drafted a paper considering legal and regulatory uncertainties arising in relation to ICOs. The paper provides an overview of ICOs and the discussion amongst market participants as to their legal characterisation which has emerged as an integral factor in the discussion around how the legal and regulatory framework will treat ICOs.

The paper then delves into the legal uncertainties which could arise from framing ICOs in specialised regimes for financial services in the U.K. and the E.U. It considers existing registration/authorisation regimes and whether there are new categories of services provider implicated in token issuance whom there is a case for registering or authorising. It also analyses the limitations of existing regulation and activities in this field with examples of regulatory "underlap" and considers what kind of bespoke regime could be constructed out of existing financial regulations. Finally, it considers issues relating to conflict of laws with respect to the scope of Digital Ledger Technology and ICOs in view of the "distributed" nature of token transactions and the use of "nomad" participants and cloud services.

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